

1 Robert A. Mittelstaedt (State Bar No. 60359)  
ramittelstaedt@jonesday.com

2 Craig A. Waldman (State Bar No. 229943)  
cwaldman@jonesday.com

3 David C. Kiernan (State Bar No. 215335)  
dkiernan@jonesday.com

4 JONES DAY  
555 California Street, 26th Floor  
5 San Francisco, CA 94104  
Telephone: (415) 626-3939  
6 Facsimile: (415) 875-5700

7 Attorneys for Defendant  
Adobe Systems Inc.

8  
9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN JOSE DIVISION**

12 IN RE: HIGH-TECH EMPLOYEE  
13 ANTITRUST LITIGATION

14 THIS DOCUMENT RELATES TO:  
15 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' JOINT RESPONSE TO  
PLAINTIFFS' ADMINISTRATIVE  
MOTION TO FILE UNDER SEAL  
PLAINTIFFS' SUPPLEMENTAL  
MOTION IN SUPPORT OF CLASS  
CERTIFICATION AND RELATED  
DOCUMENTS**

Pursuant to N.D. Cal. Civ. L.R. 7-11 and 79-5, Defendants hereby jointly respond to Plaintiffs' Administrative Motion to File Under Seal (i) Plaintiffs' Supplemental Motion for Class Certification, (ii) all or portions of the exhibits to the Declaration of Dean Harvey filed in support of Plaintiffs' Supplemental Motion for Class Certification, (iii) all or portions of the exhibits to the Declaration of Lisa Cisneros filed in support of Plaintiffs' Supplemental Motion for Class Certification, (iv) portions of the Expert Witness Report of Kevin F. Hallock, (v) portions of the Supplemental Expert Witness Report of Edward E. Leamer, (vi) portions of Exhibits 1 and 2 to the Supplemental Expert Witness Report of Edward E. Leamer. This information has been designated Confidential or Attorneys-Eyes Only under the Stipulated Protective Order (Modified by the Court) (Dkt. No. 107). Defendants are filing corresponding declarations in support of their respective sealing requests that will attach the specific exhibits each defendant seeks to seal in whole or in part.

#### **I. LEGAL STANDARD**

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, inter alia, the protection of "a trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit has "carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a nondispositive motion," where the requesting party shows good cause exists to keep the records under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at \*6 (N.D. Cal. March 22, 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) ("[A] 'particularized showing' under the 'good cause' standard of Rule 26(c) will 'suffice[] to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.'"); see also *Pintos v. Pacific Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) ("In light of the weaker public interest in nondispositive materials, we apply the 'good cause' standard when parties wish to keep them under seal.")).

1     **II. GOOD CAUSE EXISTS TO SEAL DEFENDANTS' CONFIDENTIAL**  
2     **INFORMATION**

3     The redacted portions of the Supplemental Motion, the exhibits to the Harvey and  
4     Cisneros Declarations, the Expert Report of Dr. Hallock, the Supplemental Expert Report of  
5     Edward Leamer, and Exhibits 1 and 2 to the Supplemental Expert Report of Dr. Leamer contain  
6     confidential and commercially sensitive information about employee compensation, including  
7     Defendants' compensation data as well as information that reflects certain Defendants' internal  
8     decision-making regarding their business strategies related to compensation and internal  
9     assessments of their and other employers' competitive position in the labor market. Defendants  
10    also seek to keep under seal those materials that reflect compensation practices, strategies and  
11    policies; recruiting and hiring data, practices, strategies and policies; and personal identifying  
12    information of employees or candidates. Defendants designated the foregoing information  
13    "Confidential" or "Attorneys Eyes Only" under the Protective Order.

14    As each of the Defendants' separately filed declarations demonstrate, Defendants kept the  
15    sealed information confidential and the public disclosure of this information would cause each  
16    Defendant harm by giving third-parties (including individuals responsible for competitive  
17    decision-making) insights into confidential and sensitive aspects of each of the Defendants'  
18    strategies, competitive positions, and business operations, allowing these third-parties to  
19    potentially gain an unfair advantage in dealings with and against each of the Defendants. A  
20    significant portion of the sealed information is employee compensation data. This type of  
21    information is regularly sealed because of its confidential and private nature. *See Renfro v.*  
22    *Unum, et al.*, No. 09-2661, 2010 BL 104197 (N.D. Cal. May 10, 2010) (granting a motion to seal  
23    records containing plaintiffs' salary information); *Nettles v. Farmers Ins. Exch.*, No. C06-5164,  
24    2007 WL 858060, at \*2, 2007 BL 247444 (W.D. Wash. Mar. 16, 2007) (holding that salary  
25    review notices for third parties "who have not chosen to have their salary history placed into the  
26    public record" could be sealed.); *EEOC v. Kokh, LLC*, No. CIV-07-1043, 2010 U.S. Dist. LEXIS  
27    82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09, 2012) (noting that portions of summary  
28    judgment materials were filed under seal because they contained "confidential salary

1 information.”).

2 Similarly, compensation policies, practices and decisions are routinely subject to a  
 3 sealing order. *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C 07-01841, at  
 4 \*16, 2008 U.S. Dist. LEXIS 53616, 2008 BL 123131 (N.D. Cal. June 09, 2008) (noting that a  
 5 “compensation policy” was filed under seal); *Hertz Equip. Rental Co. v. Useda*, No. CV-10-  
 6 4953, 2010 BL 259718, at \*2 (N.D. Cal. Nov. 02, 2010) (granting a temporary restraining order  
 7 to enjoin a former employee from using a company’s “confidential and/or trade secret employee  
 8 compensation information”).

9 In addition, good causes exists to seal confidential information relating to a company’s  
 10 internal business, recruiting or hiring practices, strategies and policies, including confidential  
 11 analyses of a company’s market position. *See* Fed. R. Civ. Proc. 26(c)(1)(G) (permitting sealing  
 12 of “a trade secret or other confidential research, development, or commercial information”);  
 13 *Krieger v. Atheros Commc’ns, Inc.*, Case No. 11-CV-00640, 2011 U.S. Dist. LEXIS 68033 at  
 14 \*3-4 (N.D. Cal. June 25, 2011) (holding that a company could seal a presentation from its  
 15 investment adviser that contained “sensitive and confidential information, including long-term  
 16 financial projections, discussions of business strategy, and competitive analyses”); *Network*  
 17 *Appliance, Inc. v. Sun Microsystems Inc.*, Case No. C-07-06053, 2010 U.S. Dist. LEXIS 21721,  
 18 at \*9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s] business  
 19 strategies and opportunities that were not widely distributed”); *see also TriQuint Semiconductor,*  
 20 *Inc. v. Avago Techns. Ltd.*, Case No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at \*9 (D. Ariz.  
 21 Dec. 13, 2011) (granting motion to seal “market analysis information,” under “compelling”  
 22 reason standard applicable to dispositive motions, including a “spreadsheet tracking information  
 23 regarding potentially competitive products,” and other business strategy documents, such as  
 24 information relating to “product competitiveness, and market and technological opportunities  
 25 and risks”).

26 Additionally, good cause exists to seal information pertaining to Defendants’ recruiting  
 27 policies and practices that are proprietary business methods and/or trade secrets. This  
 28 confidential and commercially sensitive business information is non-public and should remain

1 confidential under Rule 26(c)(1)(G) (permitting sealing of “a trade secret or other confidential  
2 research, development, or commercial information”); *see also* Cal. Civ. Code § 3426.1(d)  
3 (defining trade secrets as information that “(1) Derives independent economic value, actual or  
4 potential, from not being generally known to the public or to other persons who can obtain  
5 economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable  
6 under the circumstances to maintain its secrecy.”).

7       Good cause also exists for sealing the identities and personal contact information of  
8 specific employees or applicants that are contained in the Motion or accompanying materials.  
9 These employees or applicants have not sought to make their identities known or placed in the  
10 public record. *Nettles* at \*2 (holding that the interests of private parties outweighed the public’s  
11 right of access with respect to information pertaining to third party salary and employment  
12 separation information).

### 13       **III. CONCLUSION**

14       For the foregoing reasons, Defendants respectfully request that this Court order Plaintiffs’  
15 Supplemental Motion for Class Certification and accompanying materials to be placed under  
16 seal. In accordance with Civil Local Rule 79-5(d), a proposed order granting Defendants’  
17 Response to Plaintiffs’ Administrative Motion to Seal has been lodged with the Clerk in hard  
18 copy and served on counsel for Plaintiffs. In accordance with Civil Local Rule 79-5(d),  
19 Defendants’ proposed redacted versions of the Supplemental Motion, exhibits to the Declarations  
20 of Mr. Harvey and Ms. Cisneros, the Expert Reports of Drs. Hallock and Leamer, and Exhibits 1  
21 and 2 of Dr. Leamer’s report are being lodged with the Clerk in hard copy showing proposed  
22 redacted portions highlighted in yellow within a sealed envelope.

1 Dated: May 17, 2013

O'MELVENY & MYERS LLP

2  
3 By: /s/ Michael F. Tubach  
Michael F. Tubach

4 George Riley  
5 Michael F. Tubach  
6 Lisa Chen  
7 Christina J. Brown  
8 Two Embarcadero Center, 28th Floor  
9 San Francisco, CA 94111  
10 Telephone: (415) 984-8700  
11 Facsimile: (415) 984-8701

*Attorneys for Defendant APPLE INC.*

12 Dated: May 17, 2013

KEKER & VAN NEST LLP

13 By: /s/ Daniel Purcell  
14 Daniel Purcell

15 John W. Keker  
16 Daniel Purcell  
17 Eugene M. Page  
18 633 Battery Street  
19 San Francisco, CA 94111  
20 Telephone: (415) 381-5400  
21 Facsimile: (415) 397-7188

*Attorneys for Defendant LUCASFILM LTD.*

22 Dated: May 17, 2013

JONES DAY

23 By: /s/ David C. Kiernan  
24 David C. Kiernan

25 Robert A. Mittelstaedt  
26 Craig A. Waldman  
27 David C. Kiernan  
28 555 California Street, 26th Floor  
San Francisco, CA 94104  
Telephone: (415) 626-3939  
Facsimile: (415) 875-5700

*Attorneys for Defendant ADOBE SYSTEMS, INC.*

1 Dated: May 17, 2013

JONES DAY

2  
3 By: /s/ Robert A. Mittelstaedt  
Robert A. Mittelstaedt

4 Robert A. Mittelstaedt  
5 Craig E. Stewart  
555 California Street, 26th Floor  
6 San Francisco, CA 94104  
Telephone: (415) 626-3939  
7 Facsimile: (415) 875-5700

8 Catherine T. Zeng  
JONES DAY  
1755 Embarcadero Road  
9 Palo Alto, CA 94303  
Telephone: (650) 739-3939  
10 Facsimile: (650) 739-3900

11 *Attorneys for Defendant INTUIT INC.*

12 Dated: May 17, 2013

MAYER BROWN LLP

13  
14 By: /s/ Lee H. Rubin  
Lee H. Rubin

15 Lee H. Rubin  
16 Edward D. Johnson  
Donald M. Falk  
Two Palo Alto Square  
17 3000 El Camino Real, Suite 300  
Palo Alto, CA 94306-2112  
18 Telephone: (650) 331-2057  
19 Facsimile: (650) 331-4557

20 *Attorneys for Defendant GOOGLE INC.*

21 Dated: May 17, 2013

BINGHAM McCUTCHEN LLP

22 By: /s/ Frank M. Hinman  
23 Frank M. Hinman

24 Donn P. Pickett  
Frank M. Hinman  
Three Embarcadero Center  
25 San Francisco, CA 94111  
Telephone: (415) 393-2000  
26 Facsimile: (415) 383-2286

27 *Attorneys for Defendant INTEL CORPORATION*

1 Dated: May 17, 2013

COVINGTON & BURLING LLP

2  
3 By: /s/ Emily Johnson Henn  
Emily Johnson Henn

4 Robert T. Haslam, III  
5 Emily Johnson Henn  
333 Twin Dolphin Drive, Suite 700  
6 Redwood City, CA 94065  
Telephone: (650) 632-4700

7 *Attorneys for Defendant PIXAR*

8 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been  
9 obtained from all signatories.  
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